IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

SHELDON LANGER, RONALD M. YERMACK, LANCE R. GOLDBERG, ROBERT PROSI and GERALD PETROW, individually and on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	No. 2014 CH 00829
v.	)	Calendar 6
CME GROUP, INC., a Delaware Corporation; THE BOARD OF TRADE OF THE CITY OF CHICAGO, INC., a Delaware Corporation,	)	Hon. Celia G. Gamrath, Presiding
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANTS' MOTION TO DECERTIFY THE CLASS

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I. INTRODUCTION

The circumstances of this case have changed significantly since class certification. Just as Plaintiffs' theories of liability have shifted multiple times, so too have their theories on how they will be able to show damages on a class-wide basis. And with expert discovery now complete, it is clear that Plaintiffs have no means of proving class-wide damages on any of their claims, rendering certification at this stage improper. While the Court certified a damages class that was billed by Plaintiffs to pursue two types of claims—Fee Claims and Globex Claims—Plaintiffs have now elected to forgo entirely any attempt to prove class-wide damages on their Fee Claims.

As for the remaining Globex Claims, Plaintiffs have abandoned both approaches that their expert represented were "common and reliable methodologies to measure damages on a class-wide basis." (Expert Declaration of Jonathan I. Arnold, Ph. D. (Nov. 21, 2019) ("Ex. 1").) Instead, they seek billions of dollars of "damages" based on an opinion that is nothing more than guesswork, and which violates this Court's order dismissing Plaintiffs' claim for a revenue share and disgorgement of Globex-related fees. As a result, Defendants have concurrently filed a motion to exclude the testimony of Dr. Arnold (the "Motion to Exclude"), without which Plaintiffs cannot establish class-wide damages at trial.

Defendants' Motion for Summary Judgment should terminate this suit, but if any part of it nonetheless survives, this case can no longer proceed as a class action. As explained below, the very basis for this Court granting class status—to pursue class damages—is now foreclosed. For this reason, in the event summary judgment for Defendants is not granted in full, the Court should grant Defendants' motion to decertify the class pursuant to Section 2-802 of the Illinois Code of Civil Procedure.

II. BACKGROUND

A. Plaintiffs' Claims

Plaintiffs brought this case, seeking to represent a class of certain—but not all—Class B Members in CME Group ("CMEG") and the Board of Trade of the City of Chicago, Inc. ("CBOT," and together with CMEG, "Defendants"). (Fourth Amended Class Action Complaint ("Ex. 2") ¶ 30.) Plaintiffs allege that, although Defendants honored the Core Rights in each Exchange's charter for many years following CME's and CBOT's demutualizations, since 2009, Defendants have made a series of decisions regarding access to the Globex electronic trading platform (the "Globex Claims") and changes to their fee policies (the "Fee Claims") that have violated the Core Rights and caused damage to the value of their B Shares. (*See generally id.*) In the alternative, Plaintiffs argue that if the Court determines that the acts complained of do not violate the Plaintiffs' Core Rights, the Court should nonetheless find that they violate the covenant of good faith and fair dealing with respect to those Core Rights. (*Id.* ¶¶ 130–146.)

B. Certification of a Damages Class

Plaintiffs' attempt to cobble together a workable class has seen its share of twists and turns. On November 22, 2019, Plaintiffs moved for certification, proposing a single class of "[a]ll owners of CME Class B shares or CBOT Class B memberships from June 1, 2009, to November 22, 2019" except for corporate members and CMEG insiders who hold B shares or memberships. (Pl. Mem. In Support of Class Cert. ("Ex. 3") at 7.) In support of their motion, Plaintiffs offered the opinion of Dr. Jonathan I. Arnold that class-wide damages could be proven using a regression analysis or a hypothetical negotiation analysis. (*Id.* at 20–22.)

Defendants opposed class certification, arguing, among other things, that Plaintiffs had failed to establish that a direct measure of damages via a regression was possible, or that a "hypothetical negotiation" approach was even applicable in this case. Defendants also argued

that class treatment would not result in a fair or efficient adjudication of the controversy because Plaintiffs asked the Court to make wide-ranging rulings regarding the rights of all Class B Members and to issue injunctive relief, all while intentionally excluding a significant portion of the membership with whom they have antagonistic interests. (*See generally* Defs.' Mem. In Opp. ("Ex. 4").) Indeed, the Plaintiffs' proposed class excluded the vast majority of members actually trading on the CME and CBOT exchanges.

At a status hearing on the Motion for Class Certification, the Court expressed surprise at Plaintiff's one-class, ten-year proposal, and asked Plaintiffs to provide alternative proposals. (*Id.* at 10; Transcript of November 18, 2020 Proceedings ("Ex. 5") at 7:14–22; 9:8–10.) But the surprises did not stop there. Plaintiffs next petitioned the Court to certify an even broader all-members class that ***included*** the corporate members. (Pl. Proposed Class Definitions ("Ex. 6") at Ex. A thereto.) Defendants objected to this newly proposed all-members class, pointing out that, among other issues, over the previous seven years Plaintiffs had repeatedly emphasized the conflicts between the individual and corporate members of each Exchange. (Joint Submission ("Ex. 7") at 15.)

At the hearing on Plaintiffs' Motion for Class Certification, the Court grappled with the challenge of certifying a class with, or without, the corporate members:

> [The proposed class] is really designed for this subset of Class B's who somehow think that they were damaged by the action of defendants but to the exclusion of their brethren who, again, have these v[e]ry same core rights. So, again, it is a difficult sell right now to say that we should have this class that excludes all of these B members. And it's also a difficult sell to say we should include all of the B members, including these large Corporate Members from who you are seeking to take away their benefits.

(Transcript of March 4, 2021 Proceedings ("Ex. 8") at 20:18-21:6.) The Court concluded that Plaintiffs could not adequately represent an all-members class. (*Id.* at 28:16–19.) And the original class that excluded corporate members was improper because "[a]t a minimum," two

subclasses were required to address the "material[ly]" different CME and CBOT charters. (*Id.* at 30:4–9.) The Court sent Plaintiffs back to the drawing board.

Plaintiffs then submitted a third proposal for class certification in advance of an informal follow up conference with the Court. At the conclusion of that conference, Defendants understood that Plaintiffs would file that same proposal to make it part of the official record. Instead, Plaintiffs filed yet another request for class certification, titled Plaintiffs' Alternative Proposals for Class Certification ("Ex. 9"). In this fourth bite at the apple, Plaintiffs made four additional proposals: (1) certifying a damages-only class; (2) providing corporate members notice and a chance to intervene; (3) certifying a liability-only class; and/or (4) certifying separate division and lessor subclasses. (*See generally id.*) Plaintiffs also informed the Court that they were "not at this time seeking certification of classes to pursue declaratory or injunctive relief." (*Id.* at 3).

The Court ultimately certified two classes: a class of all current owners of CMEG Class B shares, except B Shares held by corporate members or officers, directors, and employees of CME, and a corresponding class for CBOT B shareholders. (Mem. Op. and Order on Class Cert. ("Ex. 10") at 9.) The Court also certified division subclasses. (*Id.* at 9–11.) The Court explained that certification was limited to "a damages class only, for Plaintiffs are no longer seeking certification of a class on declaratory or injunctive relief." (*Id.* at 11.) And the Court specifically "denie[d] Plaintiffs' request to reserve certification of a class to pursue declaratory or injunctive relief until after trial and only if Plaintiffs prevail on liability." (*Id.*) Finally, the Court "retain[ed] the power to alter, modify, or decertify the classes or add additional subclasses as the issues are refined and there is a more fulsome record." (*Id.*)

In accordance with the Court's certification order, the class notice described both categories of Plaintiffs' claims. The notice advised that Plaintiffs "seek damages based on the alleged impact of Defendants' practices on the values of Class B Memberships or the additional payments Plaintiffs contend that Class B Members would have received if Defendants had complied with their obligations to honor Class B Members' Core Rights." (Class Notice ("Ex. 11") at 5.)

C. Plaintiffs' Damages Case Disappears

On July 14, 2023, Plaintiffs served their expert reports. None of those reports offered testimony to support Plaintiffs' Fee Claims, including as to any alleged damages. Instead, Plaintiffs offered a damages report from Dr. Arnold, in which he purports to "estimate Plaintiffs' economic loss from the deprivation of their exclusivity rights in the ADC trading floor" (i.e., the Globex Claims), and a separate causation report of Dr. Arun Sen, in which he opines that the opening of the ADC caused the entire alleged "devaluation" in the value of the B shares.[1] In fact, Dr. Sen opines that the Globex Claims are ***the only plausible cause*** of the devaluation, meaning that ***none*** of it is attributable to the Fee Claims. Plaintiffs subsequently informed Defendants that they had determined to abandon the pursuit of class-wide damages based on the Fee Claims.

Plaintiffs' decision is unsurprising given that, as set forth in Defendants' summary judgment motion, and as Defendants have said all along, CME and CBOT have consistently provided a fee preference to Class B members relative to non-members. Plaintiffs convinced the Court that they could represent a class seeking to recover damages based on a devaluation of the

[1] Dr. Sen does not attempt to quantify damages. Instead, he performs a purported causation analysis only as to CMEG Class B-1 shares, provides a partial causation analysis as to CBOT B-1 memberships, and does not complete any analysis for the remaining CMEG Class B shares and CBOT Class B memberships.

B shares caused, in part, by Defendants' fee policies, but now concede that aspect of their case was entirely wrong.

Plaintiffs' attempt to now focus solely on their Globex Claims suffers from the same flaw. Plaintiffs do not offer a damages model that measures any loss in the value of their B shares, nor that is otherwise tethered to their claims. Rather, Plaintiffs posit a world that makes no sense, but in which they receive massive payments mostly from other Class B members, funneled through the Defendants. But they do so through a highly speculative and unreliable opinion that, for the reasons set forth in the accompanying Motion to Exclude, should be struck in full. Without any class-wide damages, there can be no damages class.

III. ARGUMENT

A. Legal Standard

A court's order certifying a class may be amended before a decision on the merits. 735 ILCS 5/2-802. "The authority to amend a previous certification exists because it may be beneficial to the orderly administration of justice to set aside an earlier determination of a suitable class action if clearly changed circumstances or more complete discovery warrant it." *Mashal v. City of Chi.*, 2012 IL 112341, ¶ 45; *see also Key v. Jewel Cos.*, 176 Ill. App. 3d 91, 99–100 (1st Dist. 1988) (decertification required where class treatment was no longer appropriate based on "a full discovery record which did not exist when the preliminary decision to certify the class was made").

Decertification is appropriate if Plaintiffs are unable to satisfy the requirements for maintaining a class action set forth in Section 2-801, 735 ILCS 5/2-801. The Supreme Court of Illinois has summarized those requirements as follows:

> [A] class may be certified ***only if the proponent establishes the four prerequisites*** set forth in the statute: (1) numerosity ("[t]he class is so numerous that joinder of all members is impracticable"); (2) commonality ("[t]here are questions of fact or

> law common to the class, which common questions predominate over any questions affecting only individual members"); (3) adequacy of representation ("[t]he representative parties will fairly and adequately protect the interest of the class"); and (4) appropriateness ("[t]he class action is an appropriate method for the fair and efficient adjudication of the controversy").

Avery v. State Farm Mut. Auto. Ins. Co., 216 Ill. 2d 100, 125 (2005) (quoting 735 ILCS 5/2-801) (emphasis added). To maintain certification, Plaintiffs must present proof establishing each certification requirement. *See Weiss v. Waterhouse Sec., Inc.*, 208 Ill. 2d 439, 453 (2004) (contrasting certification motions with motions to dismiss and stating certification motions are "a matter of proof").

B. Plaintiffs Have Not Identified Any Reliable Method of Proving Class-Wide Damages

As described above, the class certification process in this case was painstaking. Plaintiffs struggled to come forward with a workable class given their exclusion of half of the Class B members of CBOT and CME, including all of the members who paid to co-locate at the ADC. To overcome the Court's concern regarding the absence of Class B members who shared the same Core Rights, Plaintiffs ultimately determined to seek certification of a damages only class. They did so propped up by Dr. Arnold's class certification opinion that he could prove class-wide damages on both their Fee Claims and their Globex Claims.

But now, between their abandonment of class damages on their Fee Claims and Dr. Arnold's wholly deficient opinion on their Globex Claims, Plaintiffs have no way to prove class-wide damages in this case. As explained in Defendants' accompanying Motion to Exclude, Dr. Arnold's report is unsound and unreliable and should be fully excluded.

In the context of this motion, not only does Dr. Arnold fail to follow a reliable methodology, but he argues for damages that expose the intractable problem with this case proceeding as a class action: Class B members all have the same Core Rights, but this case is being pursued by a handful of people, on behalf of only a subset of Class B members, whose

views of the Core Rights conflict with a substantial number of Class B members whom they exclude.

According to Plaintiffs, all Class B members have the right to access the ADC and to connect to Globex ***for free***. Nonetheless, Dr. Arnold does not measure how a violation of this alleged right affects the value of all members' Class B shares, nor does he advocate for free co-location for all members. Instead, he posits a world in which the Class B members that actually access the ADC and trade—the excluded corporate members—would ***pay*** fees to co-locate, and CMEG would then pass those fees on to the Plaintiffs in this case, ***none of whom have ever paid to co-locate at the ADC***. He adds on top of that a slice of transaction fees, including those paid by the Class B members excluded from this case. The problem with this made-up world is that this case is supposed to be about a violation of all members' Core Rights, and was certified as a class to seek compensation for that alleged violation. But Plaintiffs have turned it into something else: Largely a wealth pass-through from the excluded Class B members to the Class B members in this case.

In any event, without Dr. Arnold's testimony, which should be excluded in full, Plaintiffs have no evidence on which they can prove class-wide damages at trial. Courts applying the "virtually identical" federal Rule 23, *see Barliant v. Follett Corp.*, 74 Ill. 2d 226, 231 (1978), have not hesitated to decertify damages classes where, as here, Plaintiffs failed to deliver on their promised methods of showing class-wide damages. *See, e.g.*, *Johnson v. GEICO Cas. Co.*, 310 F.R.D. 246, 254-55 (D. Del. 2015), *aff'd*, 672 F. App'x 150 (3d Cir. 2016); *see also Johnson v. Yahoo! Inc.*, No. 14 CV 2028, 2018 WL 835339, at *4 (N.D. Ill. Feb. 13, 2018) (decertification required "in light of defendant's showing that individualized consent inquiries will predominate"). If, after deciding the Motion for Summary Judgment, this case proceeds, it

should only be on an individual basis. *See Bueker v. Madison Cnty.*, 2016 IL App (5th) 150282, ¶ 35 ("Without a methodology to calculate damages on a class-wide basis . . . the calculation of actual damages would be too individualized to be handled as part of the class action.").

CONCLUSION

As Defendants have maintained all along, none of Plaintiffs' claims are susceptible to class-wide proof of damages. Accordingly, Defendants respectfully request that this Court grant Defendants' Motion to Decertify the Class.

Dated: February 16, 2024
Chicago, Illinois

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 16, 2024, I electronically filed a true and correct copy of the foregoing Memorandum of Law in Support of Defendants' Motion to Decertify the Class with the Clerk of the Court, and that I also served a true and correct copy of the foregoing Memorandum of Law by electronic mail on the following counsel:

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

Dated: February 16, 2024

/s/ Marcella L. Lape
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